No. 373.

Supreme Court of the United States

OCTOBER TERM, 1926

W. A. MARSHALL & CO., INC., *Petitioner*,

v.

AMERICAN PALESTINE LINE, INC., Claimant of the STEAMSHIP "PRESIDENT ARTHUR", her Engines, Boilers, etc., *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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Printed in the United States by S. H. Tyson, Printer, 404 Pearl Street, New York.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 272

W. A. MARSHALL & CO., INC.,
Petitioner,

v.

AMERICAN PALESTINE LINE, INC., claimant of the STEAMSHIP "PRESIDENT ARTHUR", her Engines, Boilers, etc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion of the District Court may be found at pages 35-38 of the record. It is reported in 22 Fed. (2nd), p. 584.

The opinion of the Circuit Court of Appeals, affirming the opinion of the District Court, is reported in 25 Fed. (2nd), p. 648.

Jurisdiction of This Court.

The judgment sought to be reviewed was entered April 16th, 1928. Petition for Writ of Certiorari was filed on July 14th, 1928.

The jurisdiction of this Court to issue the writ prayed for is conferred by the Act of February 13th, 1925.

Question Presented.

Petitioner contends that the decision below is contrary to the decisions of this Court relative to what constitutes "payment" and as to when the taking of a note or trade acceptance constitutes the waiver of a maritime lien. It is also claimed by petitioner that the decision below is in conflict with the decisions of other Circuit Courts of Appeals.

Respondent sees no conflict between the decision below and the decisions of this Court or other Circuit Courts of Appeal, any apparent conflict being a mere difference in decision because based upon different facts. The decision below involves no question of great public importance and is concerned solely with a question of fact, which question has been twice decided in respondent's favor.

Statement.

Respondent conceives the decision below involves nothing but a question of fact and hence we must state the facts.

The question below was whether a maritime lien existed against the S.S. "President Arthur", on account of coal delivered for the vessel's use by petitioner pursuant to two written contracts. Respondent's position was that these contracts represented the entire agreement between the parties and that the coal was not furnished upon the credit of the ship.

The terms of payment provided in these contracts are as follows:

> "The Buyer shall *pay* for the said coal as follows:
>
> "(1) By delivering to the Seller a trade acceptance drawn by it in favor of the Seller, dated the date of the delivery of the coal, due March 10, 1925, covering railroad freight of $2.79 a gross ton, which acceptance is to be endorsed by JACOB WACHT, JACOB S. STRAHL, and JOSEPH W. GOTTLIEB.
>
> "(2) A trade acceptance drawn by the Buyer in favor of the Seller, dated on the same day, due May 8, 1925, covering the balance of the purchase price, to wit: $2.31 a gross ton, representing the coal, harbor barge freight, and insurance on coal while in barges, which acceptance is also to be endorsed by the said JACOB WACHT, JACOB S. STRAHL, and JOSEPH W. GOTTLIEB.
>
> "THE ENTIRE CONTRACT BETWEEN THE PARTIES IS STATED ABOVE, AND THERE IS NO OUTSIDE CONDITION, WARRANTY, AGREEMENT OR UNDERSTANDING." (Rec., 24)

After the signatures to the contract is the following:

> "In consideration of the execution of the foregoing contract, and of the delivery of said coal by the Seller to the Buyer, and in con-

sideration of One Dollar ($1.00) paid to each of the undersigned, the receipt of which is hereby acknowledged, we jointly and severally agree to endorse the said trade acceptance described in the foregoing contract between the Seller and the Buyer."

The coal was delivered and the first acceptance, for freight, was paid. (Rec., p. 19.) The second acceptance for a balance of $9,382.62 was not paid. (Rec., p. 19.) A civil action by petitioner for this amount against the endorsers, Joseph W. Gottlieb, Jacob Wacht and Jacob S. Strahl, is now pending in the New York State Courts. (Rec., p. 28.)

The ground of decision by the District Court and by the Circuit Court of Appeals was simply that, upon the facts shown, the contract between petitioner and respondent represented their entire agreement and that this contract did not contemplate holding the ship for the coal furnished.

The facts were as follows:

The contract for the sale of the coal was negotiated by the respondent with Mr. Sandford, Sales Manager of petitioner. (Rec., p. 29.) The Palestine Line wanted more than thirty (30) days for payment. (Rec., p. 14.) Mr. Sandford testified that this made the coal company suspicious and they looked further into the Palestine Line's financial standing and came to the conclusion that they did not like the account but wanted trade acceptances so that the coal company could get the money at any time by discounting them. (Rec., p. 14.) When trade acceptances were mentioned the coal company stated it wanted additional security as they were not satisfied as to the credit of the Palestine Line. (Rec., p. 14.) Sandford wrote the Palestine Line a letter which said:

"*Regarding terms of payment*, we would require a trade acceptance payable on March

> 10th for the freight and boat freight which would amount to $3.04 per gross ton, and an additional trade acceptance for the balance, amounting to $2.06 per gross ton; *these trade acceptances to be endorsed by responsible persons acceptable to us*". (Italics ours) (Rec., p. 26.)

The individuals who were acceptable to the coal company were Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb, who were investigated by the coal company's Credit Department (Rec., p. 16). Affidavits filed in the State Court by petitioner and submitted in evidence in this proceeding show that without the endorsements of the three individuals the coal company would never have sold the coal to the Palestine Line. (Rec., p. 32.) In the affidavit of Sandford he referred to the provision of the contract relative to the three endorsers as "one of the essential terms of the offer." (Rec., p. 29.) He quoted for the benefit of the Court four significant parts of the contract and among them listed the endorsements of the three individuals "*as part of the consideration of the sale of said coal*". He referred to these endorsers not as accommodation endorsers, but as straight endorsers "*for without the consideration of such endorsements, the plaintiff would never have sold the coal to American-Palestine Line, Inc.*" A further affidavit showed that the sale was made "only on condition that the trade acceptances to be given in payment would be signed by three endorsers acceptable to the plaintiff" and that the endorsement of these individuals "was an essential prerequisite for the purchase of this coal". (Rec., p. 34.) In addition to the above the contract itself recites that there was "no outside condition, warranty, agreement or understanding."

The issue is, did anything remain to be done by claimant after the giving of the trade acceptances so far as the contract itself was concerned? If not, and it seems to us elementary that there was not, the obligations of the claimant under the contract were completed, the coal was paid for, and, being paid for, no lien could exist.

ARGUMENT

I.

Only a question of fact is presented.

Upon the facts above stated the District Court, Judge Thacher, held that the contract between the parties was conclusive and that as it provided for payment upon the date of delivery of the coal, the said payment to take the form of trade acceptances endorsed by three individuals, payment was made when such acceptances, so endorsed, were delivered on that date. Hence, no maritime lien could arise because the coal was paid for, within the meaning of the contract, upon the date of delivery of the acceptances.

The Circuit Court of Appeals in affirming, after reciting the facts above mentioned, held that the written contract between the parties provided the sole terms of payment, that such terms consisted of trade acceptances with three individual endorsers and that when such acceptances were delivered, the transaction was complete. The Court held that cash was not delivered because the contract provided otherwise. The Court further held that there was nothing in the Merchant Marine Act of 1920 which prevented parties making a contract

which did not contemplate holding a ship for supplies furnished. The Court said:

> "Where parties agree to an express contract as to payment, the contract becomes extinguished by full performance and so it is impossible that either party should have any claim against the other arising out of the contract. No lien can exist in favor of the materialman when he receives in payment that for which he stipulated when the contract was made."

The case, therefore, narrows down to a question of fact, i.e., whether the parties intended by their agreement to state the terms, and the sole terms, upon which they would deal with each other, or whether aside from the agreement, one party could rely upon a maritime lien against the ship. This question of fact, as before noted, was resolved in favor of respondent by the District Court, and the District Court's decision was affirmed by the Circuit Court of Appeals.

This Court has frequently said it will not issue certiorari to discuss facts. (*Southern Power Company* v. *North Carol. Public Service Company*, 263 U. S. 508; *United States* v. *Johnston*, 268 U. S. 220; *Federal Trade Commission* v. *American Tobacco Company*, 274 U. S. 543. In the last named case Mr. Justice McReynolds said:

> "Proper decision of the controversy depends upon a question of fact. • • •
>
> "It now appears to us that this matter of fact is of no general importance. Accordingly, we adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations. And upon that ground alone we affirm the judgment below."

II.

The contract, by its terms, precludes any other method of payment than therein provided.

The contract, after providing specific terms of payment, i.e., by endorsed trade acceptances, states:

> "The entire contract between the parties is stated above, and there is no outside condition, warranty, agreement, or understanding."

These words have only one possible meaning; that the contract just made is the entire agreement between the parties, which precludes the possibility that the coal company could validly reserve a right to obtain payment in any other form than as provided in the contract, i.e., by endorsed trade acceptances. The contract is, therefore, complete and payment within its meaning was made, when such endorsed trade acceptances were delivered. As Mr. Justice Taney said in *Phelps* v. *Camilla*, Fed. Cases No. 11,073:

> • • • "If the party does not choose to rely on the contract which the maritime law implies in such cases, but takes an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied; and if he takes a note or bill of exchange, or any other personal engagement, for the payment of the debt, he is presumed to rely on this personal security, and to waive his lien, unless he stipulates that the liability of the vessel shall still continue."

The effort of the coal company to obtain payment in cash by proceeding against the ship is therefore clearly at variance with the terms of the contract.

III.

There is no conflict of decision.

Petitioner claims the present decision is in conflict with that of this Court in *The Emily Souder*, 17 Wall (84 U. S.) 666 and *The Bird of Paradise*, 5 Wall (72 U. S.) 545.

The first case may be dismissed with the statement that repairs were made and credit extended in a *foreign port*. It always has been the rule that in such cases credit is presumed to be extended to the ship for the reason that the financial standing of the owners is, naturally, unknown and this is true whether or not notes, drafts or other evidences of the debt are given.

In *The Bird of Paradise* a freight lien, not a maritime lien, was involved. Two trade acceptances were to be given as payment. After delivery of the first the charterer failed in business and the second trade acceptance was never even tendered. The acceptances were signed by the charterer and were unindorsed. Obviously the lien existed, but this case is in no way analogous to the present.

IV.

The decision below has no effect upon the Merchant Marine Acts of 1910 and 1920.

Petitioner has alleged as one of the reasons why its petition should be granted that the decision below nullifies the provisions of the Merchant Marine Acts of 1910 and 1920 to the effect that the burden of proof is not upon the materialman to show that he supplied his materials upon the credit of the ship. It is sufficient to say that the Merchant Marine Act of 1920 provides (C. 250, Subsec. S. 41, Stats. 1005):

> "Nothing in this section shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time, by agreement or otherwise."

As the Court below said, nothing in the Act bars proof that whatever was furnished was furnished on the credit of the owner or a third party and in no sense upon the credit of the ship (*Ely* v. *Murray*, 200 Fed. 368).

It certainly cannot be contended that the Merchant Marine Acts *require* parties to contract with each other upon the credit of the ship. They have their ordinary constitutional right to make such contracts as they choose. The present contract, clear and precise as to its terms of payment, is a case in point.

V.

The decision below is not in conflict with decisions of other Circuit Courts of Appeals.

Petitioner cites on this point *El Amigo*, 285 Fed. 868 and *Ricou* v. *Fairbanks Morse Co.*, 11 Fed. (2nd) 103.

In the first case a charter party provided that a bond should be given to indemnify the owner against any claims against the vessel. Supplies were furnished the ship and the case narrowed down to whether the furnisher of supplies was aware that the charterer could not bind the ship. There was no question of construction of the contract involved.

In *Ricou* v. *Fairbanks Morse Co.* the question was whether the thing libeled was a vessel or an uncompleted structure, and whether retention of title by the owner of equipment furnished was inconsistent with the existence of a maritime lien.

The last case cited was *Leschen Rope Co.* v. *Mayflower G. M. & R. Co.*, 173 Fed. 855. This case involved a mechanics lien and an unindorsed note. The difference between mechanics liens and maritime liens has already been noticed by this Court. There is nothing in the case conflicting with the decision below.

It is true that Judge Learned Hand, in his dissenting opinion, construed the Merchant Marine Act differently from the majority of the Court, but he had to adopt such construction after determining that the giving of the endorsed notes did not constitute payment, contrary to the holding of the majority of the Court. It is quite evident that if the giving of the endorsed acceptances constituted

payment, the effect of the Merchant Marine Act, as amended in 1920, does not enter into the case at all. Even to approach that construction of the Act, the Court must first hold that the giving of endorsed acceptances, expressly required under a contract as payment, did not constitute payment, and the cases that we have cited are all to the effect that it did. We again call attention to the language of Chief Justice Taney, in

> *Phelps* v. *The Camilla*, Taney 400; Fed. Cas. No. 11073 (1838),

quoted by Judge Manton (R., 46) and requoted by petitioner at the top of page 4 of the petition.

By a familiar rule of interpretation the Act of 1920 must be construed in the light of existing law. It, therefore, by providing for the effect of a waiver, adopted the already established rules as to what would constitute a waiver. And the decision of Chief Justice Taney in *Phelps* v. *The Camilla*, was an outstanding case on that subject. Judge Hand's opinion seems to be in conflict with Justice Taney's, and, in view of this rule of interpretation, not to be distinguishable by reason of the statute.

VI.

Petitioner has confused cases of payment by endorsed and unendorsed notes.

The courts have always recognized a distinction between a case wherein the buyer has given his own note, unendorsed, and one in which he has given his note endorsed by others, or others' notes. Mr. Justice Miller in *Taylor* v. *Commonwealth*, Fed. Cas. 13,787, held that an agreement to ac-

cept an endorsed note, followed by delivery of the note and acceptance of it, constituted payment within the meaning of the agreement and the vendor's claim was on the note itself. This case has been followed in a number of instances: "*The Illinois*", Fed. Case 7005; "*The James J. Furber*", 129 Fed. 808, 813; *Atlas S. S. Co.* v. *Colombian Land Co.*, 102 Fed. 358; *Hall* v. *Stevens*, 116 N. Y. 201, 207.

The rule in New York is:

> "Where a creditor accepts the obligation of a third party for a debt contracted contemporaneously, the presumption is that it was taken in payment, and the burden of proving the contrary rests upon him who asserts it. Where, however, the obligation is received for a precedent debt, the presumption is that it was not taken in payment and the burden of proof is shifted accordingly. (Noel v. Murray, 13 N. Y. 167, 171; Gibson v. Tobey, 46 N. Y. 637, 640, 7 Am. Rep. 397; Hall v. Stevens, 116 N. Y. 201, 206; 5 L. R. A. 802; Whitbeck v. Van Ness, 11 Johns 409)."
>
> *Dibble* v. *Richardson*, 171 N. Y. 131, 138.

The case of *Kokomo Strawboard Co.* v. *Inman*, 134 N. Y. 92, 94, cited by petitioner, was a case involving the taking of an *unendorsed* note of the buyer, which is clearly not analogous.

The dissenting opinion herein, with all deference, likewise confuses *payment in fact* with payment as contemplated by the contract, and seems to intimate that if the coal company did not receive actual money, it should have a lien. Everyone will concede there was no payment of actual cash in the present case, otherwise there would have been no suit. But there was payment within the meaning of the contract, and the coal company

still has its action against the endorsers which action it is at present pursuing in the State Courts.

Other cases in which the principle has been recognized that a debt may be paid by a note, or otherwise than by money, are:

Murray v. *Lazarus*, 1 Paine, 572, 577.
Sheehy v. *Mandeville*, 10 U. S. (6 Cranch) 253, 264.
Segrist v. *Crabtree*, 131 U. S. 287, 289.

Conclusion

Petitioner raises no question which is deserving of a review by this Court and petition should be denied.

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New York,
August 1928.